

212604

SIDLEY AUSTIN BROWN & WOOD LLP

BEIJING
BRUSSELS
CHICAGO
DALLAS
GENEVA
HONG KONG
LONDON

1501 K STREET, N.W.
WASHINGTON, D.C. 20005
TELEPHONE 202 736 8000
FACSIMILE 202 736 8711
www.sidley.com
FOUNDED 1866

LOS ANGELES
NEW YORK
SAN FRANCISCO
SHANGHAI
SINGAPORE
TOKYO
WASHINGTON, D.C.

ENTERED
Office of Proceedings

NOV 23 2004

Part of
Public Record

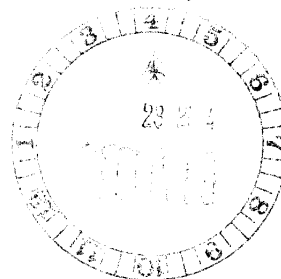
WRITER'S E-MAIL ADDRESS
pmoates@sidley.com

WRITER'S DIRECT NUMBER
(202) 736-8175

November 23, 2004

By Hand Delivery

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001



**Re: STB Docket No. 42070, Duke Energy Corporation v. CSX
Transportation, Inc.**

Dear Secretary Williams:

Enclosed for filing on behalf of CSX Transportation, Inc. ("CSXT") in the above-referenced proceeding are a signed original and ten (10) copies of the Reply Of CSX Transportation, Inc. To The Response Of Duke Energy Corporation To The Board's October 20, 2004 Order ("Reply"). Additionally, this filing includes a floppy disk containing an electronic version of the Reply.

Please acknowledge receipt of this submission for filing by date-stamping the enclosed duplicate paper copy and returning it to our messenger.

If you have any questions concerning this filing, please contact one of the undersigned. Thank you for your attention to this matter.

Sincerely,

G. Paul Moates
Terence M. Hynes
Paul A. Hemmersbaugh

Enclosures

cc: Counsel for Complainant (w/encls.)

2/2604

BEFORE THE
SURFACE TRANSPORTATION BOARD

DUKE ENERGY CORPORATION,

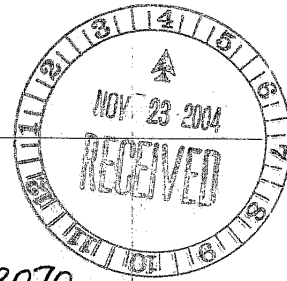
Complainant,

v.

CSX TRANSPORTATION, INC.

Defendant.

42070
Docket No. 42069



ENTERED
Office of Proceedings

NOV 23 2004

Part of
Public Record

REPLY OF CSX TRANSPORTATION, INC. TO THE
RESPONSE OF DUKE ENERGY CORPORATION TO THE BOARD'S
OCTOBER 20, 2004 ORDER

CSX TRANSPORTATION, INC.

Ellen M. Fitzsimmons
Peter J. Shultz
Paul R. Hitchcock
CSX Transportation, Inc.
500 Water Street
Jacksonville, Florida
(904) 359-3100

G. Paul Moates
Terence M. Hynes
Paul H. Hemmersbaugh
Sidley Austin Brown & Wood LLP
1501 K Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Attorneys for Defendant.

DATED: November 23, 2004

)	
DUKE ENERGY CORPORATION,)	
)	
Complainant,)	
)	
v.)	Docket No. 42070
)	
CSX TRANSPORTATION, INC.)	
)	
Defendant.)	

CSX Transportation, Inc. (“CSXT”), Defendant in the above-captioned maximum reasonable rate proceeding, hereby submits its Reply to the “Response of Duke Energy Corporation to the Board’s October 20, 2004 Order,” filed on November 19, 2004 (hereinafter the “Duke Response”). CSXT is filing this Reply in much less than the 20 days which the Board’s rules allow to permit an expeditious resolution of the limited, albeit very important, area of disagreement between it and Duke Energy Corporation (“Duke”) on the proposed schedule for phasing proceedings.

Duke correctly states that the parties have been able to reach “essential agreement in regard to the timeline” (Duke Response at 4) for the various matters that will need to be addressed in connection with proceedings directed at determining whether the phasing constraint of the Constrained Market Pricing (“CMP”) Guidelines can or should be applied in this case, and, if so, in what manner phasing could or should be ordered by the Board. That agreement includes the important point that the three Eastern coal rate cases -- i.e., the instant case plus *Duke Energy Corporation v. NS Railway Co.*, Docket No. 42069, and *Carolina Power & Light*

Company v. Norfolk Southern Railway Company, Docket No. 42072 -- are separate proceedings, each of which should be handled on its own schedule. However, the parties have a serious disagreement about the fair and appropriate procedure for the submission of evidence addressed to the phasing constraint and the standards that the Board will adopt for making its determination.

CSXT proposes that the parties file simultaneous Opening and Reply Statements of Fact and Argument (which should include argument on relevant issues of law) on the same dates that Duke proposes for the first two rounds of the three-rounds of submissions that it seeks -- that is, CSXT proposes that the parties make simultaneous opening filings on the 110th day following issuance of a Board Decision setting the schedule for this proceeding (referred to by both parties as "D+110") and simultaneous reply filings on D+140. Duke by contrast seeks the opportunity to make two filings -- an opening and a rebuttal -- but would allow CSXT only a single "reply" filing.

Duke argues that it should be permitted to open and close because it bears the burden of proof on the phasing constraint. Although CSXT agrees that Duke should properly bear the burden of proof on factual issues in any phasing proceeding, it does not agree that burden justifies allowing Duke to file two rounds of evidence while limiting CSXT to a single round. Duke contends that the procedure "followed in the earlier phase of this case followed this pattern." (Duke Response at 4). However, in a more analogous portion of this proceeding -- the Board's order directing the parties to submit additional evidence concerning the costs and revenues of re-routed traffic -- the Board directed the parties to file two rounds of evidence with each party filing simultaneously in each round. See Decision, *Duke Energy Corp. v. CSXT* and *CP&L v. Norfolk Southern Railroad Co*, STB Doc. Nos. 42070, 42072 (served Oct. 14, 2003).

This approach, which worked well for those previous supplemental submissions, is exactly what CSXT proposes for evidence and argument concerning phasing. As the Board found when it ordered the parties to submit supplemental evidence last Fall, allowing two rounds of evidence on a reasonable schedule should also facilitate accomplishment of the Board's goal of expeditious consideration and resolution of relevant issues (here, phasing). *See id*

Further, in the primary evidentiary phase of this proceeding, each party was permitted to make a submission in each of the three rounds of evidence and argument that the Board ordered for compilation of the extensive record on stand-alone and variable costs. In other words, both CSXT and Duke filed Opening, Reply, and Rebuttal Evidence and Argument because each had different issues that it addressed in each phase. In each of the three rounds of SAC evidence, each party made a significant filing that dealt with not only the issues of stand-alone and variable costs, but also with other important matters (such as CSXT's justification for raising Duke's rates by the amount of the challenged increases and Duke's attacks on the percentage reduction methodology) that helped develop a complete record for the Board's consideration.

Moreover, because of the paucity of precedent, it is clear that a central focus of phasing proceedings will necessarily be the determination of what legal standards the Board will apply in its evaluation of Duke's post-*Decision* request for phasing. For example, at this time CSXT anticipates that it may argue that: (1) phasing is not available to a shipper that fails to invoke the remedy in its complaint or at any time prior to the Board's issuance of its Decision on the merits of the shipper's challenge, or which otherwise waives its right to seek such a remedy; and (2) the Board may not consider the factors mentioned in the Coal Rate Guidelines in connection with phasing unless and until the complainant first proves with specificity that the challenged rail rates (which the Board has found to be reasonable) will cause "significant economic dislocation"

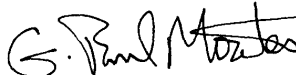
(i.e. complainant must make a threshold showing – as a condition precedent to the Board’s consideration of other factors or balancing of the equities -- that implementing the full reasonable rates immediately will cause significant economic dislocation). See Coal Rate Guidelines, 1 I.C.C.2d 520, 546-47. These are legal questions, not questions of fact. Neither side has the burden of proof on such questions of law, and the Board would benefit from both parties’ contemporaneous exposition of the applicable legal standards, and their responses to the standards proposed by the other party.

Disagreement concerning the governing legal standards is more than a theoretical possibility. It is apparent from discussions between counsel regarding the likely scope of discovery that there are significant areas of disagreement between the parties about the appropriate standard for determining whether phasing should be ordered in this case. That disagreement will require the Board to address important issues that have not been presented to it previously. CSXT respectfully submits that the Board will best be aided in its analytical efforts by the development of a record based upon the parties clearly engaging and joining issue on those important matters through simultaneous filings at the outset of the proceedings.

CSXT's proposed schedule and procedure are appended in Exhibit 1. CSXT respectfully requests that the Board order their adoption.

Respectfully submitted,

CSX TRANSPORTATION, INC.



Peter J. Shudtz
CSX Corporation
1331 Pennsylvania, Ave., N.W.
Washington, D.C. 20004
(202) 629-2600

G. Paul Moates
Terence M. Hynes
Paul A. Hemmersbaugh
Sidley Austin Brown & Wood LLP
1501 K Street, N.W.
Washington, D.C. 20005

Ellen M. Fitzsimmons
Paul R. Hitchcock
CSX Transportation, Inc.
500 Water Street
Jacksonville, FL 32202
(904) 359-3100

Attorneys for Defendant

Dated: November 23, 2004

Exhibit 1

D ¹ + 15	Discovery served.
D + 45	Responses and objections to discovery requests due.
D + 50	STB Discovery Conference. ²
D + 80	Completion of Production.
D + 110	Simultaneous Filings of Opening Statements of Fact and Argument.
D + 140	Simultaneous Filings of Reply Statements of Fact and Argument.
D + 170	Parties file Briefs.

¹ “D” represents the service date of the decision in which the Board adopts a procedural schedule for this case. The Parties will confer after the STB issues the decision establishing “D” and will agree on dates certain for all events, avoiding weekends and holidays.

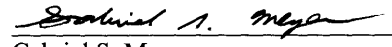
² If significant discovery issues are not resolved, a delay in the proposed schedule may be necessary to accommodate motions to compel and additional discovery conferences. The parties have agreed, however, to try to avoid such conflicts.

CERTIFICATE OF SERVICE

I hereby certify that, on this 23rd day of November, 2004, the foregoing Reply of
CSX Transportation, Inc. To The Response Of Duke Energy Corporation To The Board's
October 20, 2004 Order was served by hand upon:

C. Michael Loftus
Robert D. Rosenberg
Andrew B. Kolesar III
Kendra A. Ericson
Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

Attorneys for Complainant



Gabriel S. Meyer